EXTENT OF THE LEGISLATIVE POWER TO LIMIT FREEDOM OF CONTRACT. — A recent case decides that the constitutional guarantees of "liberty" and "property" [1] forbid the legislature to declare invalid any clause in a contract whereby an arbitrator's award is made conclusive of the rights of the parties thereunder. *Adinolfi* v. *Hazlett*, 242 Pa. 25, 88 Atl. 869. The court holds that freedom of contract may not be abridged except in the interest of "good morals" or the "welfare of the general public," and that the statute in question promotes neither of these ends. The conclusion, namely, that the legislature is powerless to deal with a question of policy which has produced wide diversity of judicial opinion,[2] suggests an inquiry into the soundness of the premises.

It is now settled that any statute limiting the absolute freedom to make and enforce contracts is a deprivation of "liberty" and "property," [3] and without "due process of law" unless the statute can be sustained as an exercise of the "police power." [4] The extent of this "police power" thus becomes the vital question. As to this, two things are now tolerably clear. First, it extends to legislation calculated to promote any of the substantial interests of the community at large, other than the parties to the contract.[5] Secondly, whatever legislation has long been customary will be sustained without question.[6]

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[1] The clause relied on is Art. 1, § 1 of the Pennsylvania Constitution, declaring the right of "acquiring and possessing property" to be "indefeasible." 1 PURDON'S DIGEST, 114. But as the reasoning is that regularly adopted under the "due process" clause in force everywhere, Pennsylvania included, the case will be discussed in the light of that provision. 1 PURDON'S DIGEST, 122; see COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., p. 500.

[2] The cases are collected in WALD'S POLLOCK ON CONTRACTS, 3 ed., p. 448. Even in Pennsylvania an agreement to arbitrate future disputes was invalid if the arbitrators were not named. Commercial Union Ass. Co. *v.* Hocking, 115 Pa. 407, 8 Atl. 589; *cf.* Hartupee *v.* Pittsburg, 97 Pa. 107.

[3] Allgeyer *v.* Louisiana, 165 U. S. 578, 17 Sup. Ct. 427; Adair *v.* United States, 208 U. S. 161, 28 Sup. Ct. 277; Gillespie *v.* People, 188 Ill. 176, 58 N. E. 1007.

[4] Lochner *v.* New York, 198 U. S. 45, 25 Sup. Ct. 539. The Supreme Court has recently restated this formula by declaring that "liberty" means only reasonably regulated freedom, and that in this sense it is absolutely guaranteed by the Constitution. Chicago, B. & Q. R. Co. *v.* McGuire, 219 U. S. 549, 567, 31 Sup. Ct. 259, 262; Schmidinger *v.* Chicago, 226 U. S. 578, 589, 33 Sup. Ct. 182, 185. This seems to be an attempt, by narrowing the meaning of "liberty" and exaggerating that of "due process of law," to support the conception of the police power adopted by the cases in note 18, *infra*.

[5] The validity of legislation to secure certain limited public interests is universally recognized; viz., health: Jacobson *v.* Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358; safety: New York & N. E. R. R. Co. *v.* Bristol, 151 U. S. 556, 14 Sup. Ct. 437; Soon Hing *v.* Crowley, 113 U. S. 703, 5 Sup. Ct. 730; morals: Booth *v.* Illinois, 184 U. S. 425, 22 Sup. Ct. 425. But it is sometimes suggested that the power to promote the public welfare generally is to be taken in a "restricted sense." Opinion of the Justices, 208 Mass. 619, 622. This notion seems to be repudiated by the Supreme Court. See Chicago, B. & Q. R. Co. *v.* People *ex rel.* Grimwood, 200 U. S. 561, 592, 26 Sup. Ct. 341, 349. And it is difficult to perceive the precise restrictions on a power which justifies infringement of private rights in order to protect game: Lawton *v.* Steele, 152 U. S. 133, 14 Sup. Ct 499; reclaim waste land: Chicago, B. & Q. R. Co. *v.* People *ex rel.* Grimwood, *supra*; *cf.* Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112, 17 Sup. Ct. 56; facilitate commerce: Noble State Bank *v.* Haskell, 219 U. S. 104, 31 Sup. Ct. 186; and confine business competition to methods deemed of public advantage: Central Lumber Co. *v.* Dakota, 226 U. S. 157, 33 Sup. Ct. 66. There is really no authority for the supposed "restrictions."

[6] "Mill acts" Head *v.* Amoskeag Mfg. Co., 113 U. S. 9, 5 Sup. Ct. 441; Otis Co. *v.*

Beyond this it is vigorously contended that the police power does not go. A considerable body of decisions, of which the principal case seems to be one, rest upon the notion that the power is confined to the detailed enforcement of the maxim *sic utere tuo ut alienum non lædas*, and does not extend to preventing individuals from making contracts detrimental to their own interests.[7]

It can hardly be said that the authorities support such a proposition. The close dependence of the public welfare on that of the individual has forced the courts to sustain legislation barring persons from employments injurious to their health,[8] or which invalidates contracts by employees to release their employers from liability for future negligence.[9] On the other hand, the principles involved in laws common from the earliest times have inevitably been applied to sustain new legislation based on similar reasons. Thus, without transcending their constitutional powers, legislatures have passed from restricting the individual's freedom of contract in order to protect him against fraud[10] to restrictions preventing him from contracting with irresponsible persons;[11] from relieving debtors from some forms of oppressive contracts[12] to relieving them against many others;[13] from guarding seamen against their own improvidence[14] to protecting other laborers from oppression and sharp practice.[15] The decisions which have opposed some of these steps[16] represent no definite limitation on the police power consistently recognized even by the courts which rendered them.[17] Apart from

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Ludlow Mfg. Co., 201 U. S. 140, 26 Sup. Ct. 353; statute compelling adjoining owners to participate in mutual drainage scheme: Wurts *v.* Hodgland, 114 U. S. 606, 5 Sup. Ct. 1086. But *cf.* Eubank *v.* Richmond, 226 U. S. 137, 33 Sup. Ct. 76; acts relating to seamen: Robertson *v.* Baldwin, 165 U. S. 275, 17 Sup. Ct. 326; Patterson *v.* Bark Eudora, 190 U. S. 169, 23 Sup. Ct. 821.

[7] For a classic statement of this view, see Godcharles *v.* Wigeman, 113 Pa. 431, 437, 6 Atl. 354, 356. See also *Ex parte* Jentzsch, 112 Cal. 468, 473, 44 Pac. 803, 804, and TIEDEMAN, POLICE POWER, § 1.

[8] Holden *v.* Hardy, 169 U. S. 366, 18 Sup. Ct. 383; Muller *v.* Oregon, 208 U. S. 412, 28 Sup. Ct. 324; Commonwealth *v.* Hamilton Mfg. Co., 120 Mass. 303. *Contra*, Ritchie *v.* People, 155 Ill. 98, 40 N. E. 454; and *cf.* Lochner *v.* New York, *supra*.

[9] Chicago, B. & Q. R. Co. *v.* McGuire, 219 U. S. 549, 31 Sup. Ct. 259.

[10] As by the statute of frauds, and other legislation sustained in McLean *v.* Arkansas, 211 U. S. 539, 29 Sup. Ct. 206; Schmidinger *v.* Chicago, 226 U. S. 578, 33 Sup. Ct. 182. But *cf.* Harding *v.* People, 160 Ill. 459, 43 N. E. 624.

[11] As by confining the businesses of insurance and banking to duly licensed corporations. Commonwealth *v.* Vrooman, 164 Pa. 306, 30 Atl. 217; Weed *v.* Bergh, 141 Wis. 569, 124 N. W. 664. *Cf.* Queen Insurance Co. *v.* Leslie, 47 Ohio 409, 24 N. E. 1072. *Contra*, Allgeyer *v.* Louisiana, 165 U. S. 578, 17 Sup. Ct. 427.

[12] Witness the statutes against usury and the common-law rules against penalties and against "clogging the equity of redemption."

[13] Selover *v.* Walsh, 226 U. S. 112, 33 Sup. Ct. 69.

[14] Patterson *v.* Bark Eudora, 190 U. S. 169, 23 Sup. Ct. 821.

[15] As in the "store order" cases. Knoxville Iron Co. *v.* Harbison, 183 U. S. 13, 22 Sup. Ct. 1. *Contra*, Godcharles *v.* Wigeman, 113 Pa. 431, 6 Atl. 354; State *v.* Missouri Tie Co., 181 Mo. 536, 80 S. W. 933. The public interest in "harmonious relations between capital and labor" was recognized in McLean *v.* Arkansas, 211 U. S. 539, 550, 29 Sup. Ct. 206, 209.

[16] See notes 8, 10, 11, and 15, *supra*.

[17] For instance, contrast Allgeyer *v.* Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, with Knoxville Iron Co. *v.* Harbison, *supra*; Godcharles *v.* Wigeman, *supra*, with Commonwealth *v.* Vrooman, *supra*; and Lochner *v.* New York, *supra*, with the dictum in Soon Hing *v.* Crowley, 113 U. S. 703, 710, 5 Sup. Ct. 730, 734.

authority, it seems hardly possible that the "due process" clause was designed to condemn all *future* restrictions on liberty of contract in the interest of the parties while sanctioning the whole variety of restrictions in the interest of the parties which were then familiar parts of the law.

The law, then, seems everywhere to be that the legislature may, to some extent, at least, restrict liberty to contract in the supposed interest of the persons restrained. Inasmuch as the courts which have opposed such legislation have been far from consistently defining any definite limitation to this branch of the police power, it is hard to see why the legislature's power to protect the citizen against himself is not as broad as its power to shield him from the acts of others.

The best-considered decisions overthrowing legislation as repugnant to the due process clause recognize a police power as broad as this, but hold that the constitution declares a strong public policy in favor of letting every citizen work out his own salvation, and that his power to do so should not be impaired except when necessary to correct an evident existing evil.[18] Such is probably the present state of the law.[19] The result is that the ultimate question for the court is one of fact,[20] which serves perhaps to explain the confusion in the authorities, as well as to excuse the principal case.[21]

PRICE CUTTING AS A TORT. — The resale price of ordinary articles of commerce cannot be limited at common law by contract or by restrictive covenants running in equity.[1] Articles manufactured by secret processes, as well as copyrighted and patented articles, have been held subject to the same rule.[2] A recent case raises the question whether the producer or his agent, although unable to fix the resale price, is wholly remediless when he is injured by resale price cutting. A department store owner, for the purpose of injuring a selling agent in his business, advertised a well-known make of sewing machines at half price. The court held him liable at the suit of the selling agent on the ground of a malicious injury to the plaintiff's business, under the guise of competition.[3] *Boggs* v. *Duncan-Schell Furniture Co.*, 143 N. W. 482 (Ia.).

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[18] Opinion of the Justices, 208 Mass. 619; Lochner *v.* New York, *supra*; Matter of Jacobs, 98 N. Y. 98. See note 4, *supra*.

[19] Substantially the same conclusion has been deduced from at least two exhaustive reviews of the federal cases: SWAYZE, CONSTRUCTION OF THE FOURTEENTH AMENDMENT, 26 HARV. L. REV. 1, 40; COLLINS, THE FOURTEENTH AMENDMENT, 109.

[20] The expediency of leaving this question of fact to some other tribunal is discussed by Mr. John G. Palfrey in 26 HARV. L. REV. 507.

[21] Whether this will continue to be the rule, and what there is in the phrase "due process of law" to make the validity of an impartial statute, duly passed, turn simply on the court's ability to perceive in it some clearly beneficent purpose, are questions to be pondered. See Central Lumber Co. *v.* Dakota, 226 U. S. 157, 33 Sup. Ct. 66; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., p. 500.

[1] BENJAMIN, SALES, 6 ed., 746; Garst *v.* Hall & Lyon Co., 179 Mass. 588, 61 N. E. 219. But see 17 HARV. L. REV. 415. For limited restrictions allowed at common law, see 25 HARV. L. REV. 59, 61.

[2] See SHRODER, PRICE RESTRICTION ON THE RE-SALE OF CHATTELS, 25 HARV. L. REV. 59; 27 HARV. L. REV. 73. But see 26 HARV. L. REV. 640.

[3] The further fact that the advertisements contained misrepresentations should be noted.